UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA PROLIFE COUNCIL POLITICAL ACTION COMMITTEE,

Plaintiff,

v.

JAN SCULLY, et al.,
Defendants and
Defendants in
Intervention.

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AND CONSOLIDATED ACTIONS.

_____/

NO. CIV. S-96-1965 LKK/DAD

O R D E R

On January 6, 1998, this court entered a preliminary injunction barring the enforcement of Proposition 208. The passage of Proposition 34 during the November 2000 elections overtook much of the previous enactment, rendering the preliminary injunction moot, except as to the slate mail provisions, Cal. Gov't Code §§ 84305.5 and 84503.[1]

[1] In the course of this opinion the slate mail provisions will be referred to as the "duplicative boxes" provision,

In accordance with the stipulation of the parties, I resolve the question of a permanent injunction on the record before the court without further evidence. Before resolving the legal questions, however, I must address certain objections the defendants have raised to the court's previous findings of fact.

I.

OBJECTIONS TO SLATE MAIL FINDINGS OF FACT

A. FINDING OF FACT NO. 438

Finding of fact No. 438 provides:

> For at least the past two decades, slate mail has been an important medium of campaigning in California elections. Because the costs of slate mail are typically shared by many campaigns, the cost to any individual campaign is usually significantly reduced. For example, slate mail plaintiffs charge political advertisers only a fraction of what it would cost in postage alone for a campaign to send mail on its own, and in some cases slate mail plaintiffs charge less than a penny per "piece." Slate mail is therefore typically the most economical means of campaigning and sometimes the only feasible means of campaigning, especially for campaigns with limited funding and for lower level offices.

Defendants object to the court's conclusions that slate mail "is typically the most economical means of campaigning" and that slate mail is "sometimes the only feasible means of campaigning, especially for campaigns with limited funding for lower level offices." Defendants concede that the record contains evidence regarding the cost of slate mailers, but submit that it either describes their cost in absolute terms or, at most, characterizes

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§ 84305.5(2), the "dollar sign" provision, § 84305.5(4), and the "$50,000 contributor" provision, § 84503.

slate mailers as one of the more cost effective methods of campaigning. Defendants contend that not a single witness compares slate mail with non-mailing forms of campaigning and therefore, there is no testimony probative of whether there are in fact more cost effective ways for a campaign to get its message across.[2]

While plaintiffs maintain that the finding is fully supported, they offer to delete the word economical and substitute the term "least costly." The benefit to either side from this alteration is lost on the court. Rather than hassle about what seems to the court a rather straightforward conclusion from the evidence, however, the court will adopt the plaintiffs' concession, if that is what it is. As to whether the finding, either as originally made or as modified is supported by the evidence, the court is satisfied that it is.

The finding that slate mail is the among the most economical means of campaigning, to the extent it is not self evident, is supported in large part by the testimony of plaintiffs' witnesses Larry Levine and Allen Hoffenblum,[3] political consultants who have been producing slate mail since 1971 and 1986 respectively.

Illustrative is Levine's testimony that "candidates and ballot measures that appeared on my slate mail in 1996 paid anywhere between 1/4 cent per piece of slate mail and 10 cents per piece of

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[2] I note in passing that defendants have not tendered evidence of any more economical means, and the court can take judicial notice of the cost of postage.

[3] Larry Levine and Allen Hoffenblum filed their direct testimony with the court in lieu of appearance at trial.

slate mail as their share of the costs of production and publication of my slate mail." Levine Testimony, at 4 ¶ 9 and Hoffenblum's testimony noting that "on average, I carry a candidate or ballot measure on my slate mail at a cost of 7.5 cents per piece of slate mail . . . in some statewide elections we have included candidates and ballot measures for as little as 1 cent per piece of slate mail." Hoffenblum Testimony, at 3 ¶ 6.

Contrary to defendants' assertions, plaintiffs' witnesses do compare slate mail to other sources of political advertising and testify that slate mail produces the greatest effect on voters relative to cost. Thus, Mr. Levine specifically states that "slate mail is a cost-effective method of mass voter communication." Levine Testimony, at 4 at ¶ 10. The witness refers to his own experience as a political consultant where he frequently produced standards for direct mail postcards and letters to voters for political candidates. Id. Comparing the various forms of political advertising, Mr. Levine notes that "such mailings can cost a campaign, including printing, list, postage, and all other costs between 30 cents for a postcard and 40 cents per piece of mail for a two color brochure. A personalized letter in an envelope can cost from 45 cents to 50 cents per letter." Id. In contrast, "slate mail can deliver messages to votes for a fraction of the cost." Id.

Similarly, Mr. Hoffenblum asserts that "because of the economies from scale from association with other candidates and ballot measures on a slate mailer, I believe that slate mail is one

of the most inexpensive and cost efficient means for a candidate and ballot proposition to communicate with a large number of voters." Hoffenblum Testimony, at 3, ¶ 6.

Finally, the court took extensive evidence of the cost of campaigning in connection with the trial of the other Proposition 208 issues. That evidence fully supports the court's conclusion, and indeed I conclude, that even large scale volunteer-centered campaigns are likely to cost more than slate mailers.

Accordingly, defendants' challenge to factual finding No. 438 as without evidentiary support must be rejected.

B. FINDING OF FACT NO. 445

Finding of fact No. 438 provides:

> The required use of three dollar signs attached to candidates and ballot measures, and isolated information about large contributors to ballot measure campaigns, will trigger strongly negative reactions.

Defendants contend that there is no reliable evidence in the record supporting this conclusion. Defendants submit that plaintiffs' evidence, essentially the expert witness testimony of Professor Shanto Iyengar and Dr. Samuel Popkin, is fundamentally flawed and is premised on insufficiently reliable statistical evidence.[4] Defendants' argument is not without strength.

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[4] The court notes that the defendants' objection comes a little late. They did not seek a hearing or otherwise seek to exclude the evidence on the basis that the experts' methodology or reasoning was not scientifically valid. See Daubert v. Merrell Dow Pharmaceuticals Inc., 113 S.Ct. 2786, 2797 (1993). Even assuming that defendants have waived the issue of admissibility, the court in its fact-finding role, must assess the weight to be accorded their testimony. Clearly, that issue also turns in significant

Nonetheless, the evidence adduced at trial taken as a whole supports the contested finding. Below, I explain why this is so.

i. Dollar Sign Provisions

Shanto Iyengar, a professor of political science at Stanford, conducted an experiment to compare voter reaction to slate mail with the dollar signs required by Proposition 208 against voter reactions to such mail with the asterisks called for in the prior law. Professor Iyengar summarized his findings as follows:

1. The results of this experiment demonstrate that the Proposition 208 changes have no beneficial effects on voter information, but important negative consequences for candidates and ballot measure campaigns, and even for the reputation of the political system in general.

2. To be identified in these mailings by dollar signs under Proposition 208 instead of by asterisks under the old format is to suffer a significant loss of public support.

3. The new format of campaign mail required by Proposition 208 contributes to increased voter cynicism about the electoral process.

Iyengar Report, p.2.

Defendants contend that the professor's study was unreliable because the two slate cards used in the test were designed by Mr. Levine, and that the structure of the slate mailer and its design were altered. In this regard, defendants argument is unpersuasive.

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part on the statistical validity underlying the witnesses' opinions.

The purpose of the study was to test voter reaction to the pre- and post-proposition slate mail requirements. Clearly then, it was necessary to alter the mailers to conform to the disparate requisites of the applicable statutes. While Mr. Levine has an interest in the outcome of this action, there are no indications of a purposeful distortion of the two cards. Rather, the post-208 card design appears to reflect the new requirements for duplicative notices, dollar signs and the identification of the two greatest contributors of $50,000 or more. Common sense recognizes that with limited space a slate mailer would have to be reformatted by whoever created it. It may be, as defendants intimate, that some other slate mailer could discover a more elegant way of addressing the requirements. Even if true, it hardly seems significant. The speculation that another slate mailer may have been more successful[5] in no way undermines the fact that Mr. Levine is experienced in the field, and from all that appears, the card he designed fairly deals with the problem the statute tendered slate mailers.

Defendants more persuasive argument relates to the scientific underpinnings of the Professor's conclusions. Indeed, Iyengar acknowledged that he would not publish the results in a social science journal without further testing, id. at 16 ¶¶ 12-17, clearly, an appropriate question under Daubert. Moreover, the

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[5] The defendants, of course, have not offered another mailer which they assert would reflect the requirements and be more appealing.

witness concedes that the education level of the population was "bordering on the extreme margin," and that the survey respondents were "probably on the young side." Iyengar Depo. at 52, ¶ 2-3 & 51 ¶ 9. He also conceded that he was not entirely sure whether the voters who responded negatively did so because they were the ones who understood what the dollar signs meant or whether they just reacted viscerally to a "toxic" symbol. Id. at 124, ¶ 14 & 125 ¶ 5. Finally, the studies conclusions were fairly limited, purportedly yielding only four statistically significant results out of the fifteen tested for, and, accordingly, only the four results that are statistically significant are reliable, while the rest are merely suggestive. Id. at 113, ¶ 9-17.

These admissions seriously undermine the weight to be accorded the testimony, and if no other evidence supported the finding, the court would be required to reconsider. The Iyengar study, however, does not stand alone.

The Finding of Fact is also supported by the testimony of Samuel Popkin, a professor of political science at the University of California, San Diego. Popkin avers "based upon my own extensive research and experience with campaigns and surveys," that "I would expect that voters would assign a negative connotation to three dollar signs after a name. After all, in newspapers and magazines, and in advertisements, this symbol in never used solely to flag a name -- the way asterisks are used. Therefore, when voters see the dollar signs I would expect them to see the three dollar signs as a negative symbol. Voters who apply practical

reasoning are unlikely to assign anything but a negative content to the three dollar signs because in their experience the symbol is never used any other way." Popkin Analysis, at 3. Even if this testimony is, as asserted by defendants, too *ipse dixit* to support the finding, the court would still reach the same conclusion.

I begin by noting that the resolution of this issue does not appear very difficult. In the court's view, the finding concerning the negative effect of the dollar signs does not require scientific support, rather the matter seems one of common sense and experience.

The association of dollars signs with campaign mailings was transparently intended to exploit the public's anxiety about political corruption.[6] Even if the proposition was not next to self evident, the motivation of the proponents of Proposition 208 fully demonstrate the propriety of the disputed finding. Put directly, the fact that the dollar sign provisions were motivated by animus,[7] further demonstrates, if further demonstration is

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[6] As I sometimes say from the bench when preposterous factual assertions are being offered, the law is blind - not stupid.

[7] Both Tony Miller and Ruth Holton, leading sponsors and participants in the drafting of Proposition 208, believed that slate mailers were "shake-down" artists. Miller Depo., at 111; Holton Depo., at 82. Miller "detested commercial slate mailers with a passion," Pltfs' Exh. #77, and believed that anything that would assist in their elimination was a good idea. Id. In like fashion, on May 22, 1995, State Senator Tom Hayden wrote a letter setting forth a list of reforms that he had sent to the Legislative Counsel. Item two is entitled "[i]ncrease disclosure on slate-mailers to discourage their for-profit use," see Pltfs' Exh. #76, and suggests that dollar signs ($$$) should be placed next to candidates and sponsors of ballot measures who pay to be "endorsed" by the mailer. Id. It is beyond peradventure that the slate mail

needed, that the new provisions sought to trigger negative reactions from the recipients of slate mail, and supports the conclusion that they would do so.

ii. $50,000 Provisions

Defendants argue that plaintiffs' evidence addressing the requirement that slate mailers identify contributors who give more than $50,000 to ballot measures is flawed, and not factually based. Professor Popkin opined that "if a card contains both dollar signs and $50,000 contributor disclosures, there is likely to be a compounding effect, so that the cue associating the card and the endorsed candidates and measures with big money will be stronger than if only one or the other appeared." Id. at 4.

Once again Professor Popkin's opinion, while it is derived from his general research and experience also simply reflects experience and common sense. Again, his testimony concerning the possible adverse effects of ethnic-named contributors reflects no more than a sad but real possibility. I do not understand the Professor to say that such a reaction is inevitable, only a risk.[8]

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provisions were not meant merely by the drafter to be informational tools to voters, but that its proponents intentionally sought to cause a negative reaction among voters, and thereby discourage the use of slate mail.

[8] Dr. Popkin notes that, "[e]thnic names often have negative connotations and any proposition could be harmed if the $50,000 contributor has a clearly ethnic name like Cruz Reynoso, Marvin Shapiro, Mario Cuomo, or Nguyen Van Hao. This could deter people with ethnic names from making large contributions, if they fear that doing so would hurt their cause and it could sometimes deter campaigns from soliciting as much money from persons with names connotating less popular ethnic groups." Id. at 5.

I conclude that factual finding No. 445 is supported by the record.

C. FINDING OF FACT NO. 446

Finding of fact No. 446 provides:

> The individuals who were responsible for the insertion of the slate mail provisions into Proposition 208 were motivated, at least in part, by their hostility toward slate mail as a means of campaign communication and toward some slate mail publishers. At least one of the effects they sought from the slate mail provisions was to deter political campaigns from purchasing space in slate mail.

Defendants argue that the record shows only that the proponents of Proposition 208 were solely concerned with avoiding voter confusion and were not motivated by animus. As I discussed in the previous section, this argument is without merit.

D. FINDING OF FACT NO. 447

Finding of fact No. 447 provides:

> Plaintiffs reasonably believe that it is necessary to include content in their slate mailers and to design formats that will minimize or offset what they reasonably believe will be the prejudicial effect of the slate mail provisions. To the extent that slate mail plaintiffs feel compelled to include content and design formats for this reason, the effect will be to further restrict their ability to control the content of their own mail.

Defendants submit that there is no evidence that the slate mail provisions will have a "prejudicial effect" and that the record is bereft of any evidence that the plaintiffs believe that they must include "content" and "design formats" to "minimize or

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offset" those effects. Defendants argument is without merit [9]

As Mr. Levine explained "[u]nder Proposition 208, in many cases the printing of a candidates full name along with the three dollar signs on the same line will exceed width or length of the space in which the information is to be printed, thus requiring me to sacrifice space on the mailer intended for my political message. Levine Testimony, at 5 ¶ 14; see also Hoffenblum Testimony, at 4 ¶ 10. Moreover, Mr. Levine also testified that "the requirement of Proposition 208 that the 'Notice to Voters' disclaimer must be printed in multiple locations further imposes on the space available for his political message. The requirement has the effect of diverting space in my slate mail which could be used to include other candidates and ballot measures in the slate mailer, or to generate additional funds to reduce proportional shares of the cost of the mailing." Levine Testimony, at 5 ¶ 15. Finally, to comply with these new provisions, Mr. Levine, had to delete an additional small eagle graphic to create space for publication for the additional disclosure box required by Proposition 208. Id. at ¶ 19.[10]

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[9] Of course, the fact that no witness specifically used the words "minimize or offset," is irrelevant.

[10] Once again, although there is testimony to support the court's conclusion, many of the findings that defendants object to are no more than self evident propositions. Thus, it really does not appear necessary to prove that when a statute compels use of space for one purpose, it prevents its use for another; or that when one is selling space it is important to make the space attractive, and compelled negative signals detract from the goal.

It is undisputable that the slate mail provisions will restrict slate mailers' ability to control the content of their own political advertising by compelling additional information in the slate mail that they otherwise would not include.

E. FINDING OF FACT NO. 450

Finding of fact No. 450 provides:

> The $50,000 contributor provision may, in some cases, be highly misleading as a characterization of the sources of funding of the ballot measure campaign.

Defendants contend that the record is inadequate to support this conclusion. They assert that the testimony of Mr. Levine in support of this factual finding has no factual basis, and that he offers no explanation as to how such disclosures misleads the public. As I have repeatedly noted, some things are really not subject to responsible debate. Moreover, Mr. Levine's observations, as a seasoned political operative, are entitled to weight as are Professor Popkin's.[11] I conclude the finding is

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[11] Popkin notes "[the $ 50,000] contribution rule gives a large and unfair advantage to propositions supported by many wealthy persons. If there are a large number of wealthy who will benefit from a proposition and they each contribute 49,000 they will not have to list any names on their mailer -- whereas a counter-campaign championed by one or two Robin Hoods would be stigmatized by the need to list names and look like a tool of the rich than the side with many wealthy supporters. This is much less likely under current law. [The $50,000 contribution] law forces campaigns to 'plead guilty,' and such a plea is therefore credible; under existing law there is a better chance for a rebuttal because the charge must be made by the opponents." Popkin Analysis, at 5. To argue that there is no scientific basis for this claim is simply to miss the point. The conclusion asserted by Popkin is one of experience and logic. It does not assert that the statutory requirement always misleads, but that it has the potential for doing so, and then uses an example to illustrate.

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F. FINDING OF FACT NO. 452

Finding of fact No. 452 provides:

> Like all forms of political communication, slate mail is subject to deception and abuse. No evidence has been presented that slate mail is subject to greater deception and abuse than other forms of political communication, and the Court finds that it is not.

Defendants submit that there is undisputed evidence that slate mail is particularly deceptive and confusing to voters.

It is of course true that Ruth Holton expressed her view that "slate mailers are extraordinarily deceptive." Holton Testimony, at 146:22-23.[12] Moreover, Cathleen Bowler, executive director of the California Democratic Party, indicated that the party felt compelled to affirmatively note on its slate mail that its was the official slate mail and to warn, "Do not be fooled by fakes or imitations," Bowler Testimony at 139, ¶ 12-14, and "Beware. Commercial enterprises are mailing voter guides that falsify Democratic Party positions. This is the only ballot guide of the California Democratic Party. The others are fakes." Id. at 140, ¶ 4-9; Bowler Testimony, at 139, ¶ 15-18 & 140, ¶ 10-23. When asked whether this language was included by the Party to ensure that voters would not be misled by commercial slate mailers, Ms. Bowler replied "yes." Id. at 139, ¶ 15-18 & 140 ¶ 10-23.

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[12] The defendants appear to have no problem with the fact that Ms. Holton's opinion is not founded on scientific study meeting Daubert standards. In accordance with good sense, plaintiffs have not contested the testimony on that ground.

It was just this kind of testimony noted above that led the court to conclude that "slate mail is subject to deception and abuse." The question is whether evidence was presented at trial which indicates that slate mail is more misleading than other forms of political communication. In that regard, the court can take judicial notice of the regular use in other forms of political communication of so called hit pieces, which distort opponents history or position. Whether slate mail is more deceptive than such other forms of political expression, is, to say the least, debatable. In any event, no compelling evidence supporting the claimed relative status of slate mail has been tendered. Accordingly, I reject defendants' challenge to factual finding No. 452.

Having resolved the factual issues, I now turn to the legal questions.

II.

CONSTITUTIONALITY OF THE SLATE MAIL PROVISIONS

A. COMPELLED SPEECH

Plaintiffs contend that because Proposition 208 compels political speech it must pass the most rigorous standards applicable to testing the constitutionality of legislation. Defendants argue against the application of the traditional First Amendment test on three grounds, first they contend that compelled factual statements are subject to less rigorous standards, second that the aspect of the slate mail the statute regulates is akin to commercial speech rather than regulation of content, and third that

the government has broader powers to regulate what they describe as express advocacy. As I explain below, the arguments are unpersuasive.

i. Factual Statements

I begin with what is now well established. Statutes compelling speech, like those forbidding speech, address matter well within the protection of the First Amendment. See Wooley v. Maynard, 430 U.S. 705, 714 (1977)("[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind."); Miami Hearald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)(statute requiring newspapers that criticized candidates to publish a reply was unconstitutional since it "operate[d] as a command in the same sense as the statute or regulation forbidding appellant to publish specified matter.").

Defendants seek to escape the consequence of this doctrine by asserting that a different standards applies, where, as they assert here, the provisions only require that the slate mailers reveal relevant factual information about the slate mailer. They assert that such compelled factual statements are not subject to the same rigorous examination as compelled opinion. The argument does not lie. Indeed, in Riley v. National Federation of the Blind, 487 U.S. 781 (1988), the High Court rejected that very distinction. Id. at 798. There, in condemning a statute requiring that charities reveal to prospective donors the percentage of receipts devoted to overhead, the Court analogized it to a statute that would be

patently unlawful, one remarkably similar in effect to the matter under scrutiny.[13]

ii. Commercial Speech

Defendants also argue that since plaintiffs are paid to put candidates and propositions on their slate mailers they are a form of advertisement, and thus a hybrid of commercial and political speech. Defendants-Intervenors' Brief, at 5 ¶¶ 17, 26-27. I cannot agree that the fact plaintiffs are paid makes any difference.

The Supreme Court "has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." Buckley v. Valeo, 424 U.S. 1, 16 (1976). Rather, the Court has taught that even if speech in the abstract is commercial, "we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestar in deciding what

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[13] The Supreme Court explained that:

> "we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden protected speech."

Riley, 487 U.S. at 798.

level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." Riley, 487 at 796. Where the advertising and political aspects of speech are inseparable, the courts cannot parse the speech and apply different standards, rather, they must adhere to the test for fully protected expression. Id.

In its findings of fact, this court has concluded that the slate mail provisions were political rather than commercial speech in that its dual purpose was to advertise support for political candidates running for office and to "lend itself to campaigning on the basis of particular ideas." Court's Findings of Fact No. 440. To the extent the jurisprudence suggests the issue is legal rather than factual, the result is the same.

In sum, the slate mail provisions, which compel the inclusion of the state's message in private political advertisements, are content-based regulations of political speech and not a form of commercial speech. The fact that slate mail is paid for has no effect on the standard of review under the First Amendment.

iii. Slate Mail Is a Form of Issue Advocacy

The defendants seek to preserve the slate mailer requirements relative to ballot measures, contending that since such measures are not abstract discussions of political issues but advocate adoption of specific ballot measures, they are subject to regulation. The defendants' argument is ingenious but unpersuasive. As I explain below, I am not free to adopt the

argument.[14]

Put simply and directly, the Constitution precludes regulation of issue advocacy, and support or opposition of ballot measures is issue advocacy.[15] See Buckley, 424 U.S. at 79; see also Vermont Right to Life Committee v. Sorrell, 221 F.3d 376 (2d Cir. 2000); Elections Bd. v. Wis. Mfrs. & Commerce, 597 N.W. 2d 721, 731 (Wis. 1999) ("Buckley stands for the proposition that it is unconstitutional to place reporting or disclosure requirements on communications which do not 'expressly advocate the election or defeat of a clearly identified candidate").

In sum, the court cannot agree with any of the defendants' arguments seeking to lower the level of scrutiny that the remaining provisions of Proposition 208 must survive. Rather, the court concludes that the slate mail provisions are a form of compelled political speech. Since the slate mailers are a form of "core political speech," I must apply 'exacting scrutiny,' and uphold the

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[14] That is not to say that if I were free to do so I would adopt defendants' argument. Central to defendants' contentions is a profound disdain for, and distrust of, the political process and a belief that voters are not capable of divining the proper course without the material that the Proposition commands plaintiffs publish. Of course, error is a risk of the democratic process. Perhaps more to the point, the Constitution does not share the defendants' elitist view. On the contrary, the High Court has said relative to the ballot contest process that the courts must not "underestimate the common man" who, given an opportunity, can sort through the cacophony and "decide what is 'responsible, what is valuable, and what is true." McIntyre v. Ohio Board of Elections, 514 U.S. 334, 349 n.11 (1995).

[15] As this court has found, a slate mailer can "lend itself to campaigning on the basis of particular ideas." Court's Findings of Fact No. 440.

restrictions only if they are narrowly tailored to serve an overriding state interest. McIntyre, 514 U.S. at 347-348. I now turn to the application of the appropriate standards to the slate mail provisions.

B. REVIEW OF THE PROVISIONS

The defendants argue that the statutes are safe from constitutional challenge because they are no more than reporting requirements, like those found constitutional in Buckley. Alternatively, they argue that even if not analogous to the Buckley reporting requirements, the provisions meet the stringent requirements for regulation of speech. Below I examine each argument in turn.

In Buckley, the Supreme Court, purporting to apply strict scrutiny, upheld provisions requiring that candidates report various campaign contributions. The Court concluded that the required reporting advanced three substantial governmental interests: (1) notifying the public of the source of campaign funds (the "information" interest); (2) preventing actual and perceived corruption in the political process ("anti-corruption" interest); and (3) creating a record keeping method to detect violations of the Campaign Act's contribution limitations (the "enforcement" interest). Id. at 64-68. Defendants insist that the slate mail provisions are no more than a form of reporting, and thus safe under Buckley. See Kentucky Right to Life, 108 F.3d 637 (6th Cir. 1997); KVUE, Inc. v. Austin Broad. Corp., 79 F.2d 922, (5th Cir. 1983). What defendants' argument ignores is the context

of disclosure in the matter at bar.

It is one thing to require disclosure of relevant contribution information on forms filed with the appropriate state officials, it is quite another to preempt the political speech of plaintiffs in order to provide the public with such information. See Turner Broadcasting System v. Federal Communications Commission, 512 U.S. 622 (1994)(requiring cable televison operators to set aside channels for local broadcasters was a regulation of the operators' speech rights because the rules "reduce[d] the number of channels over which cable operators exercise unfettered control." Id. at 637); see also Yes for Life Political Action Committee v. Webster, 84 F.Supp.2d 150, 153 (D. Me. 2000)(suggesting that if the government has information it would like to publicize, it should do so directly, rather than commandeering the political communications of others).

Because the slate mailer provisions are much more than simple reporting provisions, but rather command speech, Buckley's continence of reporting requirements does not resolve the case. Accordingly, I must turn to the governmental purposes advanced by defendants as justifying the compelled content.

Defendants submit that compelled publishing of the dollar signs, multiple notices, and the disclosure of the two largest contributors are substantially related to the state's compelling interest in providing voters with information, avoiding deception, and addressing the potential for corruption. As I now explain, each rational fails to support the statutes.

The defendants' contention that the state has a compelling interest in informing voters sufficient to justify preemption of plaintiffs' speech cannot stand. In McIntyre, an Ohio statute required mandatory identification on literature advocating a position on ballot measures. The Court held that the state's "information interest" did "not justify a [statutory] requirement that a writer make statements or disclosures she would otherwise omit." McIntyre, 514 U.S. at 348. The Court explained that "insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." Id. at 347.

Here, the government compelled speech is both more intrusive and extensive than that condemned in McIntyre. Slate mail must contain pejorative dollar symbols, duplicative notice provisions, and a disclosure statement identifying large contributors. Here, as in McIntyre, Buckley's mandatory reporting requirements are a "far cry" from this form of compelled speech. McIntyre, 514 U.S. 355.

While fraud is a legitimate governmental interest, it is clear that the statutes cannot survive on that basis. The statutes at bar, like Ohio's statue in McIntyre, are simply overbroad, "encompass[ing] documents that are not even arguably false or misleading." Id. at 351. Given that the statutes address "core

political speech" thus requiring strict scrutiny, their overbreadth requires condemnation. Id. at 346.

The defendants' anti-corruption rationale is equally unavailing. Put directly, the purported interest is simply too remote from the statute's provisions. The question presents itself in two forms, the provisions relating to advertising by candidates and ballot measure advocacy. As to each, the rationale fails.

The quid pro quo underlying contribution regulations is simply inapplicable to candidates appearing on slate mailers. The court's findings were that "payments [for slate mail] are made to slate mail publishers, who are not public officials situated to provide official favors in return, and thus [the dollar sign provisions] cannot be justified in addressing the issue of corruption or the appearance of corruption." Findings of Fact No. 451.

As to ballot measure advocacy, the rationale is equally wanting. The Supreme Court has explained that the anti-corruption interest is significantly attenuated in the context of issue advocacy expenditures, since issue advocacy expenditures do not directly support political candidates. McIntyre, 514 U.S. at 355-56.

In sum, the court concludes that the compelling interests advanced by the defendants are either not served by the statute, too remote from the statute's provisions or otherwise are too broad to survive examination under the applicable First Amendment standards.

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III.

ORDER

For the foregoing reasons, the court finds that Cal. Gov't Code §§ 84305.5 and 84503, are unconstitutional and their enforcement is permanently enjoined.

IT IS SO ORDERED.

DATED: February 27, 2001.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT